4-1-1976

James Dwight Rowe v. Commonwealth of Kentucky

Appellant's Brief 1976-SC-0157

APPELLANT'S BRIEF

547 S.W. 451

SUPREME COURT OF KENTUCKY

FILE NO. 76-157

JAMES DWIGHT ROWE ..... APPELLANT

versus

COMMONWEALTH OF KENTUCKY ..... APPELLEE

APPEAL FROM PIKE CIRCUIT COURT
HON. REED D. ANDERSON, JUDGE

BRIEF FOR APPELLANT

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I certify that copies of the within Brief for Appellant have been served on the Attorney for Appellee, Hon. Robert Stevens, Attorney General, Commonwealth of Kentucky, Frankfort, Kentucky 40601 and the Trial Judge, Hon. Reed D. Anderson, Pikeville, Kentucky 41501, as required by RCA 1.250.

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I. Where a Kentucky State Trooper who had investigated numerous automobile accidents, but only nine fatal accidents, concedes that he used no speed studies or tables to give factual circumstances, may he give an estimate of the speed of an automobile?

II. Does KRS 435.025 deny the appellant the equal protection of the laws?

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MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

On the evening of April 24, 1974, Larry Sullivan, lost his life when a car belonging to the appellant and in which he was riding as a passenger overturned south of Pikeville, Kentucky. Thereafter, the appellant was indicted under KRS 435.022. (R., pp. 2-3).

On his trial he was convicted under KRS 435.025 and from the judgment of conviction fixing his punishment as six (6) months in the county jail,

he prosecutes this motion for an appeal. (Record, p. 19).

On the evening of April 24, 1974, the appellant and a group of other young men, and not by prearrangement, met at Jerry's Restaurant, south of Pikeville, Kentucky. These individuals were Clark Akers, Richard Little, Finis Ray Compton, Robert Adams, Flem Justice, Marion Ritchie (known in this record as "Ikey"), the appellant, James Dwight Rowe (also known as "Ikey"), and the decedent, Larry Sullivan. After some discussion, it was agreed that Ikey Ritchie and Ikey Rowe would drag race and these individuals left going to the place where the drag racing was to be held. Ikey Ritchie left first with Clark Akers driving his automobile, in which Richard Little and Finis Ray Compton were riding as passengers. Next was the vehicle of the appellant, in which the decedent, Larry Sullivan, was riding, and last was the car operated by Robert Adams. Before reaching the scene of the accident the appellant passed the Akers' vehicle and was second in the line of procession at the time of the accident. (T. of E., pp. 3-5).

A short distance up the road and at a place where the pavement was broken, Rowe lost control of his car and traveled into the ditch line and turned over. After it came to a halt, the Akers' vehicle struck the passenger side of the Rowe vehicle where Larry Sullivan was riding and knocked it up the

road. (T. of E. p. 5). The estimates of the speed of the Rowe vehicle ranged from 35-50 m.p.h. (T. of E., p. 6, pp. 8-9, p. 44). The witness, Akers, Compton and Little gave these estimates of speed.

The surface of the road at the scene of the accident had been broken up by reason of reconstruction of U.S. Highway 23. (T. of E. p. 13).

Dr. David Mulliken, a Pikeville physician, came upon the scene moments after the accident and pronounced Larry Sullivan dead and described the appellant to be in a dazed condition. (T. of E. pp. 60-64).

The Pike County Coroner, Boot Hall, filed the Death Certificate of Larry Sullivan showing the cause of death was a broken neck. (T. of E. pp. 65-67).

Perhaps the most concise statement of the matter appears in the testimony of the witness, Finis Ray Compton. We quote from his testimony.

"Q 21 In what order did you all leave?

A Well, me and Clark and Richard Little was in the red car and we took off first. Ikey Rowe took off behind us, I think, and then Ikey Ritchie took off, I think, because we was in front and I didn't look back. Then that little Bobo Adams took off in his Panteria and Ikey Ritchie passed me and Ikey Rowe, you know, the

red car and the Chevy, right there at Direct or where Direct used to be.

Q 22 Who was it passed you?

A Ikey Ritchie.

Q 23 Did anyone else pass you?

A Not at that spot, no.

Q 24 Continue, please, and tell us what happened.

A Well, we just went on up the road. As I said, we was going about thirty-five or forty. I'm guessing because I wasn't driving the car, I didn't look at the speedometer. We went on up there to that little straight stretch at Campbell Oil and Tool and then Ikey Rowe went around us. We just kept going on up the road and it got real dusty and we couldn't hardly see. That was just seconds later.

Q 25 Do you have an opinion as to how fast the Rowe car was going when it passed you?

A About fifty, maybe fifty-five, just guessing."* * * *

"Q 26 According to your testimony, there were two vehicles that passed you?

A Yes.

Q 27 What was the first vehicle?

A Truck.

Q 28 And who was driving that?

A Ikey Ritchie.

Q 29 And another vehicle passed you. Is that your testimony?

A Yes.

Q 30 And who was driving that?

A Ikey Rowe."* * * *

"Q 36 Was it your impression that someone was going to race?

A Yes, sir.

Q 37 Did you have an impression as to who was going to race?

A Yes, sir.

Q 38 And what was that impression?

A Ikey Ritchie and Ikey Rowe was going up there to race."

(T. of E. pp. 32-35).

Detective Frederick Bailey of the Kentucky State Police was called to the stand by the Commonwealth at a time when no witnesses had given an estimate of the speed of the Rowe vehicle in excess of 50 miles per hour.

He testified that he arrived at the scene of the accident, that there were three (3) vehicles damaged, the Ikey Rowe vehicle, the automobile of Clark Akers and the automobile of Robert Adams. He

testified that he found a skid mark of approximately 35 feet and 1 inch and these skid marks went into the ditch of the left side of the road in the direction the Rowe vehicle was traveling, traveled 99 feet and 4 inches and continued on up the road for some distance. The Rowe vehicle was then struck by the Akers' car and was knocked on up the road, a distance of 45 feet and 4 inches. (T. of E. Question 50 through 61 and answer thereto, T. of E. pp. 86 through 88).

He testified that the Clark Akers' vehicle had skidded 29 feet and 6 inches before striking the Rowe vehicle. (T. of E. pp. 90).

The witness was then asked if he could make a determination of the speed of the Rowe vehicle. (T. of E. pp. 92).

Afterwards, there were proceedings in Chambers. He was asked on voir dire out of the presence of the jury if he had had training at the Northwestern Traffic Institute and the course of his duties as a Kentucky State Policeman. He conceded that the Northwestern Institute was a qualified authority in the field of determining speed from skid marks and when shown figure 16 and 17 from 10 Am Jur, *Proof of Facts*, he conceded that they were tables that he had studied at the Northwestern Institute. He had not used either one of these tables at arriving at his opinion as to the speed of the motor vehicle of the

appellant nor did he use figures 9, 12 and 13 in 10 Am Jur, *Proof of Facts.* (T. of E. pp. 98 and 99).

He was asked to examine figure 9 in the Appendix of 10 *Proof of Facts* and he read the following paragraph from that chart which is "Basic Skid Mark - Speed Calculator".

> "WITNESS: (Reading) Without test skids, an estimate should be made only when all four wheels have skid marks. Locate the approximate coefficient of fraction on Scale F directly opposite the most suitable pavement description". (T. of E. p. 99).

He testified that the Rowe vehicle did not leave four skid marks. (T. of E. pp. 99-100).

In response to a question of the Court, he stated that he did not use any tables in computing the speed of the vehicle but he believed, based on his training and experience, that the facts he had were sufficient on which he could rest an opinion. He further testified that the fact that a car hits a rock is a recognized procedure for determining speed although he knew of no formula by which such determination could be made. He further knew of no studies based on the figures he was relying on to form his estimates of speed. (T. of E. p. 101).

After this, the witness was permitted to testify that this was the ninth motor vehicle fatality which

he had investigated and he estimated the speed of the Rowe vehicle at 70 miles per hour. (T. of E. p. 105).

This opinion evidence was admitted under this Court's opinion in the case of *Kentucky Farm Bureau Mutual Insurance Company* v. *Vanover*, 506 S.W. 2d 517.

This reliance was misplaced as we will attempt to demonstrate.

The appellant did not differ with any of the evidence as to his speed except that of the witness, Bailey. He conceded that he was on his way to race with Ikey Ritchie but that at the time they were not racing but were on the way to a place to drag. (T. of E., pp. 132-133). In describing the accident he said:

"Q 53 Did you experience any difficulty with your car as you traveled up the road?

A Yes, I did. As I got about three-quarters of the way around the curve — about everybody that drives knows how the State Highway will cap a section of the road for about three or four hundred feet and there will be a low place on your side and the other side will be built up two or three inches and if you get over on the new pavement, which is a little higher, it will have a tendency to pull you that way. So, I had got maybe half or three-

fourths the way around the curve and the car veered off that way, I mean, it just kinda. . .

Q 54 Which way?

A Left-handed over towards the hill, and it went, say three feet or so, and I didn't think a lot about it and just pulled it back to cut it back over on my side and it just kept going.

Q 55 What do you mean when you say you cut it back?

A The steering wheel. It was getting in the wrong lane and I turned the wheel some to pull it back in my lane and it just kept going like I had cut it a little more that way.

Q 56 Did you feel any difference in the movement of the car, the handling of it?

A Well, I had no control over the steering whatsoever cause the farther it would go — I had kinda figured out that something was definitely wrong and I turned the steering wheel over as far as it would go and they have got stops. . .

Q 57 To which side did you turn it?

A To the right.

Q 58 To the right?

A I turned it away from the curve.

Q 59 And what happened?

A I turned the wheel to the right as far as it would turn and it went on.

Q 60 What did you then do?

A Well, the car at that time was getting in the ditch line and it got in the ditch and it traveled, I don't know, I'll say thirty feet, I guess, in the ditch, twenty-five or thirty feet, and I saw there wasn't anyway it was coming back and I told Larry to lay down, and he did so. He was sitting on the right side next to the door and he fell over in the seat, almost put his head in my lap, and when he laid down, I was trying to get it back in the road.

Q 61 How were you trying to get it back in the road?

A I was fighting the steering wheel trying to get it back out of the ditch and back into the highway.

Q 62 Were you able to do that?

A No, sir, I wasn't.

Q 63 What did you do with the brake?

A I hit the brakes but the way the steering wheel was cut, I was afraid to lock 'em up because when you lock up brakes and the steering is out of control, you are definitely wrecked.

Q 64 What did you next do as you were coming through the ditch?

A We came through the ditch and, like I said, Larry had laid down, and I was the whole time trying to get back in the road. We got up close to those rocks where the construction had been working over top of the highway on the left, been working on the hill and there was some rock and dirt and debris been pushed off over into the ditch and protruded out away from the mountain a foot and a half or two feet, and we got close to it and I saw there was no way in the world it was coming back and I laid down myself and it hit. That's the last thing I remember. I think at that time is where it turned over and it knocked me out and when I came to, I was, I'd say, well, I had no way really measuring, but it was over fifty feet back down the highway from the car laying in the ditch line.

Q 65 After you laid down as you were coming through that pile of rocks, do you really have any knowledge, Mr. Rowe, as to what actually happened after that?

A No, sir, I don't. When I came to, as I said, I was in the ditch line. The car sometime or other threw me out. I don't know how or what have you. All I know is that I woke up in the ditch. When I came to it was all over and Dr. Mulliken was there and all the people were out of the cars and were up the road away from me. They didn't know where I was. I had all the breath knocked out of me and I

hollered for help. I didn't know what was wrong with me, I mean, I was kinda afraid to get up, afraid I would have something broke, and Dr. Mulliken and Clark Akers, I believe, was first two people to me. But as far as the accident goes, I didn't know even that Clark's car or Bobo's car was even involved."

(T. of E., pp. 136-139).

ARGUMENT

WHERE A KENTUCKY STATE TROOPER WHO HAD INVESTIGATED NUMEROUS AUTOMOBILE ACCIDENTS, BUT ONLY NINE FATAL ACCIDENTS, CONCEDES THAT HE USED NO SPEED STUDIES OR TABLES TO GIVEN FACTUAL CIRCUMSTANCES, MAY HE GIVE AN ESTIMATE OF THE SPEED OF AN AUTOMOBILE?

The appellant predicates error in this case on the admission of the opinion evidence of the witness, Fred Bailey, fixing a speed at which the appellant's car was traveling at the time of this accident.

No objection was made to the testimony of the witness, Fred Bailey, as to the actual observations made by him in the investigation of this accident. There could clearly be no valid grounds of objection to the measurements made by the witness in his investigation of the accident. A quite different situation exists, however, with respect to his being

permitted to testify as to the speed of the automobile operated by the appellant.

The only estimates of speed, other than that of the witness, Bailey, were given by the various drivers of the cars forming the cavalcade on the evening that Larry Sullivan lost his life. Those estimates of speed, as we have noted in the Statement of the Case, ranged between 35-50 m.p.h. It is clear that the testimony of this police officer was given great weight by the jury, particularly in view of the appellant's own evidence that a tie rod end on his automobile broke causing him to lose control of his car.

Ordinarily a non-expert witness must confine his testimony to matters within his actual knowledge and cannot express his opinion upon facts that are to be ultimately determined by the jury. *Shoemaker* v. *Commonwealth,* 189 S.W. 2d 957, 300 Ky. 607; *Williams* v. *Commonwealth,* 229 S.W. 2d 765, 312 Ky. 752; *Wadkins* v. *Commonwealth,* 14 S.W. 2d 390, 228 Ky. 106.

The testimony of an expert witness, on the other hand, rests on a different footing. Even with expert witnesses, however, there are limits beyond which they cannot go. In *Pankey* v. *Commonwealth,* 485 S.W. 2d 513, the appellants offered in evidence the testimony of two alleged experts which were excluded by the Court. This evidence was offered by the appellants in that case in an effort to prove the

minimum time required to drive from Louisville, Kentucky to Cicero, Illinois under traffic conditions which prevailed over a Labor Day holiday. The witness was permitted to testify as to the distance between Louisville and Cicero, but was not permitted to fix a minimum driving time under the conditions which prevailed over Labor Day. This Court, in upholding the rejection of this evidence said:

> "In view of the fact that the witness did not and could not have known all of the driving conditions which prevailed over that long stretch of highway during all of the hours involved, his testimony was not competent upon the point".

In this case, the witness, Fred Bailey, was permitted to give his opinion evidence as to the speed of the appellant's automobile at the time of the accident. In response to a question by the Court, he testified that he had not applied any speed studies in arriving at his opinion in this case. (T. of E., pp. 100).

Nevertheless, the Court, under the authority of *Kentucky Farm Bureau Mutual Insurance Company* v. *Vanover*, 506 S.W. 2d 517, permitted the witness to give his opinion as to speed in this case.

In the *Vanover* case, a trooper and a county coroner were allowed to give estimates of the speed

of an automobile. The opinion of this Court shows that in giving his estimate of speed he had applied speed studies to accidents he had investigated.

The witness, Fred Bailey, testified that he had not applied speed studies to accidents investigated by him. Moreover, he conceded that speed tables shown to him prepared by the Northwestern Traffic Institute, where he had received his training in the study of accident investigation, explicitly stated that before an estimate of speed of an automobile could be made there must be four skid marks, and that he only had one skid mark in this case.

We think then, that the witness, Bailey, did not bring himself within the scope of the *Vanover* decision. Moreover, the comments of Justice Palmore in his dissenting opinion is particularly appropriate here. We quote:

> "I find myself in disagreement also with the decision that a witness may be permitted to estimate the speed of an automobile from the physical facts observed thereafter. The dynamics of an automobile collision being what they are, unless a person has had extensive training and experience in the actual staging of experimental accidents under a variety of conditions I do not believe his approximations of speed could possibly be sufficiently credible for acceptance in a court of law."

One must only speculate as to the effect of this testimony on the minds of the jury. A jury might properly have reached a conclusion of excessive speed based on the physical facts testified to by the witness, Bailey. That was not allowed to happen, however. The jury was allowed to hear an estimate of speed of the witness, Bailey, and that evidence taints the conviction in this case.

Such a conclusion is reenforced by reference to the well recognized rule that circumstantial evidence is insufficient in a criminal prosecution if it is as consistent with innocence as with guilt. *Hollowell* v. *Commonwealth*, 492 S.W. 2d 884, *Wilkey* v. *Commonwealth*, 452 S.W. 2d 420.

Circumstantial evidence may support a finding of guilt in any criminal charge. The point is that the jury is the trier of the fact and must be left to draw that conclusion. It cannot be left to a testimony of a witness, expert or otherwise, when it is affirmatively shown that he has not taken into consideration all of the relevant factors that must enter into the giving of an expert opinion. *Pankey* v. *Commonwealth*, supra.

DOES KRS 435.025 DENY THE APPELLANT THE EQUAL PROTECTION OF THE LAWS?

The genesis of KRS 435.025 is well known. It was an Act of the Legislature subsequent to the opinion of this Court in the case of *Marye* v. *Commonwealth*, Ky. 240 S.W. 2d 852. KRS 435.025 purported to create the offense of negligent homicide with an automobile. This Court has construed the act as authorizing conviction for a death resulting from ordinary negligence in the operation of a motor vehicle, *Kelly* v. *Commonwealth*, Ky., 267 S.W. 2d 536.

KRS 435.025, as stated by this Court in *Kelly* v. *Commonwealth*, supra, makes criminal something that theretofore was innocent and ordained future punishment for those who kill by such negligence.

In no other endeavor of human affairs in this jurisdiction can mere civil negligence afford the basis for a criminal prosecution. For example, one may operate a bulldozer on a construction project, put the same in reverse and back over and kill a fellow workman. There is no criminal liability for such act. If, however, he is operating a motor vehicle and does identically the same act, he is guilty of a criminal act under the terms of KRS 435.025 as construed by this Court. That result creates a patent inequality.

Of course, the equal protection clauses of the Federal Constitution permit the states wide scope of discretion in enacting laws. The same is true of the constitution of Kentucky, and particularly Section III thereof. It is clear, however, that the Legislature can pass the bounds of permissable conduct under the equal protection clause of our Kentucky Constitution, Section III.

In *Louisville and Nashville Railroad Company* v. *Faulkner,* Ky. 307 S.W. 2d 196, this Court had little difficulty in striking down an act of the Legislature which had been on the books since 1893 providing that in an action for killing livestock by the engine or cars of any railroad company, the mere fact of killing or injury should be prima facie evidence of negligence on the part of agents and servants of the company.

This Court struck down the statute imposing the duty upon a railroad company of proving that it was free from negligence in the killing or injuring of cattle by its engine or cars as a denial of equal protection of the laws. It did the same thing in striking down an amendment to a statute regulating motor transportation for hire which exempted, from the operation of the statute, vehicles engaged in transporting farm products. *Priest* v. *State Tax Commission,* 258 Ky. 391, 80 S.W. 2d 43. While there is not a great amount of authority, it has been held that in the field of criminal law, the

Legislature, though vested with a large measure of discretion in creating and defining penal offenses, must exercise its power in such a manner that the statute creating the offense will operate without discrimination on all persons and classes of persons similarly situated. *Sarner* v. *Union*, 55 N.J. Super 523, 151 A2d 208 and 21 Am Jur 2d, Criminal Law, Section 229.

In this day and age, KRS 435.025 was anachronistic. Perhaps that is the reason it has been repealed. The author of this brief does not know. He does believe, and submits to the Court, that this statute creating an offense of negligent homicide based on a finding of ordinary negligence could not have been enforced in this State fairly over the years. In every traffic death there is always a basis for finding civil negligence on the part of some person.

We respectfully submit that the Legislature went too far when it undertook to make mere civil negligence in the operation of a motor vehicle a criminal act, without consideration of civil negligence resulting in death in other facets of life.

CONCLUSION

Upon the whole case, we respectfully submit that the judgment of conviction should be reversed and this case remanded for a new trial.

Respectfully submitted,

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